



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2013

Ms. Hadassah Schloss
Open Records Coordinator
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2013-18295

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 502939.

The Texas General Land Office (the "GLO") received a request for all correspondence between the GLO and the Sears Methodist Retirement System ("Sears") concerning the Lamun Lusk Sanchez nursing home during a specified time period.¹ You state the GLO has released some information to the requestor with redactions pursuant to section 552.117 of the Government Code, as permitted by section 552.024(c) of the Government Code.² You claim the submitted information is excepted from disclosure under sections 552.101

¹You inform us, and provide documentation showing, the GLO sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body. See Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. See *id.* §§ 552.117, .024(c); see *id.* § 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to requestor).

and 552.111 of the Government Code. You also inform us release of some of this information may implicate the proprietary interests of Sears. Accordingly, you state the GLO notified Sears of the request for information and of the company's right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note the requestor specifically excludes veterans' names from his request; therefore, this information is not responsive. This ruling does not address the public availability of any information that is not responsive to the request, and the GLO is not required to release that information in response to the request.

Next, we note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-03726 (2013). In that ruling, we concluded the GLO (1) must continue to rely on Open Records Letter No. 2012-11747 (2012) as a previous determination and withhold or release the identical information in accordance with that ruling to the extent any of the submitted information is identical to the information previously requested and ruled upon by this office, (2) must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy, (3) may withhold the information we marked under section 552.111 of the Government Code, (4) must withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information was at issue timely elected to keep his personal information confidential pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, and (5) must release the remaining information. We note, however, the present request excludes veterans' names from the request. Thus, we find the circumstances have changed regarding the information previously withheld under section 552.101 in conjunction with common-law privacy, and the GLO may not rely on Open Records Letter No. 2013-03726 as a previous determination as to the information previously withheld under section 552.101 in conjunction with common-law privacy. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). With the exception of the information subject to common-law privacy, we have no indication the law,

³We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

facts, and circumstances on which the prior ruling was based have changed. Thus, to the extent any of the requested information not subject to common-law privacy is identical to the information previously requested and ruled upon by this office, we conclude the GLO must continue to rely on Open Records Letter No. 2013-03726 as a previous determination and withhold or release the identical information in accordance with that ruling. *See id.* To the extent the information at issue is not encompassed by the previous ruling, we will address your arguments against the release of the information at issue.

We next note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Sears. Thus, Sears has not demonstrated it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); Open Records Decision Nos. 661 at 5–6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the GLO may not withhold the submitted information on the basis of any proprietary interest Sears may have in the information.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681–82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the GLO must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining responsive information at issue is highly intimate or embarrassing. Therefore, the GLO may not withhold any of the remaining responsive information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of

section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third

party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9. We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You explain that, pursuant to the authority granted by section 164.005 of the Natural Resources Code to the Veterans' Land Board of the GLO (the "board"), the GLO entered into an agreement with Sears to manage certain veterans nursing homes. *See* Nat. Res. Code §§ 164.005, .002(a)(1) (authorizing board to enter into agreement with any person for management or operation of veterans home). Accordingly, you state the GLO and Sears share a privity of interest and a common deliberative process in relation to the management of veterans nursing homes. You claim the deliberative process privilege under section 552.111 for portions of the remaining information, which you state constitute policymaking discussions of a broad scope among GLO employees, officials, and Sears. You assert some of the remaining information consists of draft documents. You inform us the draft documents will be released in their final form. Based on your representations and our review, we find the GLO has demonstrated the applicability of section 552.111 to some of submitted information, which we have marked. Thus, the GLO may withhold the information we have marked under section 552.111 of the Government Code. We note, however, some of the remaining information at issue relates to contract negotiations between Sears and the board. Because Sears and the board were negotiating a contract, their interests were adverse at the time the communications were made. Further, we find the remaining information at issue is either factual in nature or pertains to administrative and personnel matters that do not rise to the level of policy-making for purposes of section 552.111. Accordingly, the GLO may not withhold the remaining information at issue on the basis of the deliberative process privilege under section 552.111 of the Government Code.

In summary, with the exception of the information previously withheld under section 552.101 of the Government Code in conjunction with common-law privacy, to the extent any of the information at issue is identical to the information previously requested and ruled upon by this office, we conclude the GLO must continue to rely on Open Records Letter No. 2013-03726 as a previous determination and withhold or release the identical information in accordance with that ruling. The GLO must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The GLO may withhold the information we have marked under section 552.111 of the Government Code. The remaining responsive information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 502939

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)